

No. 13,135

IN THE
**United States Court of Appeals
For the Ninth Circuit**

WATERMAN STEAMSHIP CORPORATION,
a Corporation,

Appellant,

vs.

SHIP OWNERS & MERCHANTS TOWBOAT
Co., LTD., a Corporation, and Tug
SEA FOX, INC., a Corporation, on
Their Own Behalf and on Behalf
of the Master, Officers and Crew of
the Tug Sea Fox,

Appellees.

APPELLANT'S OPENING BRIEF.

FILED

JAN 29 1952

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of the Master, Officers and Crew of
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Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final decree of the District Court of the United States for the Northern District of California, Southern Division, in admiralty.

THE JURISDICTION OF THE DISTRICT COURT AND
OF THIS HONORABLE COURT.

This proceeding was initiated by the filing of a libel *in personam* for salvage. The libel and the findings of fact disclose that salvage services were rendered on the high seas off the coasts of Oregon and Washington to a vessel owned by appellant Waterman Steamship Corporation¹ by three United States Government vessels, the tug SEA FOX owned by appellee Shipowners & Merchants Towboat Co., Ltd.² and the tugs NEPTUNE and HERCULES.

Jurisdiction in this admiralty matter is vested in the District Court of the United States under the provisions of 28 U.S. Code, Sec. 1333(1).

A final decree was made and filed in the trial Court on June 20, 1951, and entered June 21, 1951 (Apostles on Appeal, pages 70-72). A petition for appeal and order allowing appeal were filed September 17, 1951 (Apostles on Appeal, pages 73, 74) and a notice of appeal was filed September 17, 1951 (Apostles on Appeal, page 75).

Appellate jurisdiction of this Honorable Court exists under 28 U.S. Code, Secs. 1291 and 2107. The notice of appeal was filed within ninety days after the entry of the final decree.

¹Hereinafter called "Waterman".

²Hereinafter called "Shipowners".

STATEMENT OF THE CASE.

Waterman bought the HERALD OF THE MORNING (hereinafter called "Herald"), an Army special type vessel, from the United States Maritime Commission in 1948. The HERALD was then in laid-up fleet in San Francisco Bay and was to be converted at the expense of the Maritime Commission to a cargo vessel by Everett-Pacific Shipbuilding & Drydock Company³ at Everett, Washington, which company was the successful bidder for the conversion job. The conversion contract required Everett-Pacific to tow the HERALD, a "dead ship", at its expense to Everett, Washington, and obligated Waterman to name Everett-Pacific as an assured in Waterman's marine insurance policy on the HERALD. Everett-Pacific was so named in the insurance policy (Libellant's Exhibit 5).

Sudden & Christenson, Inc., as agent for Everett-Pacific in San Francisco, entered into a towage contract with Shipowners whereby the latter agreed to provide the SEA FOX as the towing tug and to "use its best efforts to tow" the HERALD to Everett, Washington, for the agreed sum of \$5,750 plus tax. The said sum of \$5,750 plus tax has been paid by Everett-Pacific to Shipowners. The tow contract purported to release the SEA FOX from liability for negligence and obligated Everett-Pacific to name Shipowners in Everett-Pacific's insurance on the tow (Respondent's Exhibit E; Apostles on Appeal, page 290).

³Hereinafter called Everett-Pacific.

A detailed statement of the events occurring during the tow from San Francisco to Everett, Washington, is attached hereto as Appendix "A". In brief, the SEA FOX with the HERALD in tow departed from San Francisco on November 5, 1948. On November 7, the towing wire broke and another tug was sent out by Shipowners from San Francisco and the vessels eventually returned to Drake's Bay where a new towing wire was transferred to the SEA FOX, although the broken "fairlead traveller"⁴ of the SEA FOX was not repaired, and thereafter the SEA FOX and HERALD resumed the voyage without having an adequate spare "insurance" wire aboard the SEA FOX. On November 13, southeast storm warnings were broadcast by the Weather Bureau and overheard by the SEA FOX. On the following day the weather worsened, and at 7:00 p.m. the SEA FOX advised the HERALD that SEA FOX had called for aid from the Coast Guard and also advised the HERALD that the SEA FOX's towing engine had broken down. The Coast Guard cutter BALSAM arrived on the evening of the 14th and rendered assistance until the HERALD was in safe waters. In addition, the tug NEPTUNE arrived in the vicinity on the late evening of November 15. In the early morning of November 16 the towline parted during severe weather. Shortly after daylight on November 16, the NEPTUNE endeavored to get a towing line aboard

⁴The "fairlead traveller" is a piece of equipment on the towing machine used to guide the cable on to the towing drum and making it possible to take in the cable without fouling.

the HERALD, but during this maneuver was thrown by a heavy wave against the bow of the HERALD and suffered damage as a result of which she sank. Later that day the BALSAM put a 10-in. Manila line to the HERALD but that line parted. The HERALD continued to drift all that day until 7:30 p.m., when on orders from the BALSAM relayed to the HERALD by the SEA FOX, the HERALD dropped her port anchor while some 10 to 12 miles from shore. At 0440 on the 17th the Coast Guard Cutter WINONA arrived at the scene and thereafter rendered assistance. During that morning, a 12" tow line was supplied by the WINONA to the HERALD and the bitter end was transferred from the WINONA to the SEA FOX. Thereafter the SEA FOX pulled on this 12" line to ease the strain on the HERALD's anchor. The HERALD continued to ride at anchor all through the day of November 17 and until the morning of November 18, when the tug HERCULES arrived from Seattle and put its towing wire aboard the HERALD. The HERALD's anchor chain was cut with a cutting torch supplied by the BALSAM, and the HERCULES with the assistance of the SEA FOX and accompanied by the BALSAM proceeded with the HERALD in tow and arrived safely at Everett, Washington, during the late evening of November 19, 1948.

As a result of the foregoing series of events, a libel *in personam* was filed by Shipowners to recover salvage services on behalf of the tug SEA FOX and

its crew, and a companion libel *in personam* for salvage was filed by Puget Sound Tug & Barge Co. on behalf of the tugs NEPTUNE and HERCULES and the crews of said tugs, which latter libel was numbered 25538-H in the files of the Clerk of the United States District Court for the Northern District of California, Southern Division. By stipulation of all parties, the two cases in the lower Court were consolidated for the purpose of trial. Judgments were rendered in favor of libelants in each case. In his memorandum opinion at the conclusion of the trial, the judge held that all salving vessels, government and private, rendered salvage services of an aggregate value of \$60,000 (Apostles on Appeal, page 46); concluded that the valuation of the services rendered by the government Coast Guard vessels was worth \$15,000 and apportioned the remaining \$45,000 as follows: \$24,750 to Shipowners and crew of the SEA FOX, and \$20,250 to Puget Sound Tug & Barge Co. and crews of the NEPTUNE and HERCULES. The judgment in favor of Puget Sound was paid and has been satisfied of record. Being gravely aggrieved by the judgment in favor of Shipowners, Waterman has taken this appeal.

ISSUES INVOLVED.

The questions presented by this appeal are:

1. The validity of the towage agreement purporting to release the tug SEA FOX from liability to the HERALD for acts of negligence of the SEA FOX.

2. Whether the SEA FOX was negligent during the tow in respect to her equipment or navigation.
3. Whether the SEA FOX is entitled to any salvage award or whether the services performed by the SEA FOX were performed merely in satisfaction of its obligation to its tow (the HERALD).
4. Whether SEA FOX carried its burden of proving that its failure to have a duly-licensed master in command of the SEA FOX not only did not but could not have contributed to the circumstances giving rise to the salvage services.
5. Whether the trial Court should have made a proper deduction from its salvage award in favor of SEA FOX by reason of the existence of the contractual relationship of tug and tow, and whether the Court allocated a sufficiently large proportion of the overall award to the services of the government vessels.
6. Whether Waterman can claim over against SEA FOX for HERALD's damages and for the amount of salvage paid to the NEPTUNE's and HERCULES' interests.

SPECIFICATIONS OF ERROR.

First. The District Court erred in failing to hold and find that the clause in the towage contract (Respondent's Exhibit "E"; Apostles on Appeal, page 290) which provided:

"4. * * * First Party shall not be responsible for loss or damage arising from faults or errors in the navigation or management of tug or tow."

was illegal and void. Assignment of Errors numbered 13 and 14 (Apostles on Appeal, page 78).

Second. The District Court erred in failing to hold and find that appellee failed to carry its burden of proving that the absence of a duly-licensed master in command of the SEA FOX not only did not but could not have contributed to the circumstances giving rise to salvage services. Assignment of Errors, numbered 5, 6, 10, 11, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

Third. The District Court erred in holding and finding that the SEA FOX interests are entitled to an award in the amount of \$24,750. Assignment of Errors, numbered 1, 4, 7, 8, 9, 12, 16, 17, 18, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

Fourth. The District Court erred in dismissing the cross-libel. Assignment of Errors numbered 2, 3, 13, 14 and 15 (Apostles on Appeal, pages 76-78).

ARGUMENT.

FIRST SPECIFICATION OF ERROR.

The District Court erred in failing to hold and find that the clause in the towage contract (Respondent's Exhibit "E"), Apostles on Appeal, page 290, which provided:

"4. * * * First party shall not be responsible for loss or damage arising from faults or errors in the navigation or management of tug and tow."

was illegal and void. Assignment of Errors numbered 13 and 14 (Apostles on Appeal, page 78).

The towage contract is one maritime in nature. Under such circumstances, the decisions of the Federal Court sitting in admiralty are conclusive of the matters involved.

Union Fish Co. v. Ericson, 248 U.S. 308, 63 Law. Ed. 261.

The provision of the towage contract purporting to free SEA FOX from liability for its own negligence is void.

Compania de Navigacion, etc. v. Fireman's Fund, 277 U.S. 66, 72 Law. ed. 787;
Mylroie v. British Columbia Mills Tug & Barge Co. (C.C.A. 9, 1920), 268 Fed. 449.

SECOND SPECIFICATION OF ERROR.

The District Court erred in failing to hold and find that appellee failed to carry his burden of proving that the absence of a duly-licensed master in command of the SEA FOX not only did not but could not have contributed to the circumstances giving rise to salvage services. Assignment of Errors, numbered 5, 6, 10, 11, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

This phase of the appeal deals with the question whether the rule of *The Pennsylvania* case, *The Pennsylvania* (1874), 86 U.S. 125, 22 Law. ed. 148, applies in a salvage situation. In that case the Supreme Court of the United States held in part:

“But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.”

Shipowners was at fault in not providing a qualified and competent master for the SEA FOX. R. T. Sommers, the “master” of the SEA FOX, had no license or certificate permitting him to serve as a master, skipper or navigating officer in charge of a watch except on inland waters in San Francisco Bay and tributaries. On this voyage Sommers in fact sailed as, and assumed the authority of, master, and in addition personally stood the 8-to-12 watch as navigating officer (Apostles on Appeal, page 298). This was a statutory fault both as to Shipowners and as to Sommers.

The International Convention covering the Minimum Requirement of Professional Capacity for Masters and Officers (effective in the United States Oc-

tober 29, 1939, text at 1938 A.M.C. 1284, administrative and penalty provisions, 46 U.S.C.A. 224a) applied to the SEA FOX, a vessel of more than 200 gross tons engaged in a voyage on the high seas. Not only does such fault subject both Shipowners and Sommers to fine (46 U.S.C.A. 222(a)(5)) but it was inexcusable and criminal misconduct for Shipowners to have entrusted not only the lives of the crew of the SEA FOX but also the sixteen lives aboard the HERALD and the HERALD itself to the orders and judgment of a man who by law in the interest of protecting life and property was prohibited from undertaking such responsibility. This fault bars not only Sommers and Shipowners, but also the crew of the SEA FOX, from any claim for salvage.

The fault being in direct violation of statute, the burden was on the salvage claimants to prove that the incompetence of the master of the SEA FOX not only did not but that it could not have contributed to the danger from which the HERALD was extricated.

See:

The Pennsylvania (1874), 86 U.S. 125, 22 L. ed. 148;

The Denali (C.C.A. 9), 112 F. (2d) 952,

wherein this Court in a stranding case applied the rule of *The Pennsylvania* case to deny limitation of liability to the owner of a vessel as against cargo claimants where the vessel's officers failed to comply with the Watches at Sea Act, 46 U.S.C.A. 223.

The rule and presumption of *The Pennsylvania* case have been applied to fix liability where a master of a tug did not have the required license. In *The City of Baltimore* (C.C.A. 4), 282 Fed. 490, the Court said:

“She was being navigated by a person without a master’s license, in a busy harbor, and in open violation of the law applicable to her * * * and, in such circumstances, it is incumbent upon her to show, not only that the absence of a licensed master did not enter into the occurrence, but that it could not have done so.”

The tug operator is held to the highest standard of care in the selection of his master, and the haphazard nonchalance of Shipowners in this case is not to be condoned. In *The Lady Pike*, 21 Wall. 1, 22 L. ed. 499, the Supreme Court, in holding a towing steamer liable for loss of cargo aboard a towed barge, said:

“Necessary equipment is as requisite as that the hull of the vessel should be staunch and strong; and she must also be provided with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route, and with a competent and skillful master, of sound judgment and discretion, and with sufficient knowledge of the route and experience in navigation to be able to perform in a proper manner all the ordinary duties required of him as master of the vessel.”

The evidence shows that the absence of a qualified master aboard the SEA FOX contributed to the situ-

ation of danger in which the HERALD was placed. The record is devoid of evidence that Sommers was in fact qualified or competent either as a navigator or as a seaman in respect to the duties and responsibilities required of a tug master on the voyage undertaken.

The sole testimony or evidence introduced by libelant to "prove" the competence and experience of R. T. Sommers was that he had made a number of previous trips up the coast (Apostles p. 246), also in violation of statute. Mr. Sommers was unable to remember when he had made these prior trips and pursuant to stipulation (Apostles pp. 301-302) the record of trips which he had made in 1947 and 1948 was produced and considered by the District Court as an exhibit. This exhibit is reproduced as Appendix C hereto, apparently having been omitted from the Apostles through inadvertence despite the stipulation including this item in the record which stipulation was filed with this court on October 30, 1951. From Appendix C it appears that the only prior experience Mr. Sommers had had in towing vessels off shore was in August 1948. Such experience is wholly meaningless. The libelant's obligation to the HERALD was not satisfied by furnishing a tug with an unlicensed, unqualified, fair weather skipper; respondent and the 16 men aboard the HERALD were entitled to assume Shipowners would furnish a qualified tug skipper who would know what to do in November weather in the north Pacific. The Pacific Coast Pilot (Sixth Ed.), a United States Govern-

ment publication, p. 37, summarizes its description of the weather to be expected in the North Pacific in August with the words "August is usually a quiet month" while the November summary is "November is a stormy month". Fair weather experience does not qualify a skipper for service in the North Pacific in November.

By the testimony of the **SEA FOX** it appears that its insurance wire was lost by fouling on its own drum on November 7 before putting into Drake's Bay. This was a standard and usual operation and if conducted competently should not have resulted in loss of the wire.

Having lost the insurance wire, it was negligence on the part of the **SEA FOX** to proceed on its voyage from Drake's Bay without having on board an extra wire of proper length.

In *The Barryton* (D.C. S.D. N.Y.), 42 F. (2d) 561, Judge Coleman said:

"The tug could certainly have rendered assistance if it had not been encumbered with the Foggy Dew and had an additional hawser. The lack of the latter was no excuse, because I believe it was negligence to be without it."

The difficulty the **SEA FOX** had experienced in handling the **HERALD** before reaching Drake's Bay, whether due to the incompetence of the crew of the **SEA FOX** or the inadequacy of its equipment, only aggravated its negligence in leaving Drake's Bay without taking precautions to insure that the **SEA**

FOX was adequately equipped to continue the voyage in a proper manner. There is not one bit of evidence that at Drake's Bay the towing machine of the **SEA FOX**, which, according to the **SEA FOX** testimony had been subjected to extraordinary strain, was inspected for indications of the defects which later caused its failure. Neither is there one bit of evidence that the "fairlead traveller" which the **SEA FOX** log states was damaged and removed on November 8th (Finding IV, Apostles p. 58) and without which it was impossible for the **SEA FOX** to handle the tow wire without fouling, was repaired or replaced before leaving Drake's Bay. The testimony of the **SEA FOX** is that the gears of its towing engine were damaged—and that the tow lines subsequently parted in direct consequence of the extraordinary stress of weather. In connection with the claim it should be noted that the log of the **SEA FOX** is replete with erasures and changes. For example, the entry for the 8:00 to 12:00 P.M. watch November 13, which apparently originally read, "Towing out of commission", has been changed to read, "Towing engine broke". This is particularly interesting since in the testimony given by the **SEA FOX** witnesses there was no mention of any difficulty with or breakdown of the towing gear of the **SEA FOX** until the 14th, at which time it was testified the clutch gears of the towing machine gave way. The log indicates that the towing engine gears carried away at 7:00 A.M. on the 14th. It is interesting to conjecture what portion of the towing engine of the

SEA FOX was out of commission on the 13th and what relation this failure had to the carrying away of the gears at 7:00 A.M. on the 14th. The conjecture is particularly interesting since there was no severe weather on the 13th.

As mentioned above, it appears from the SEA FOX log that the SEA FOX towing engine broke during the 8:00-12:00 P.M. watch on the 13th when there was no severe weather. It also appears from the SEA FOX log (Respondent's Exhibit A, not printed) that the SEA FOX did not even attempt to secure Coast Guard assistance until 4:20 P.M. the following day, some 17 hours later, even though on the 13th the SEA FOX had received radio warnings of approaching heavy weather. Such casual disregard of the HERALD's safety resulted directly from the criminal negligence of the libelants in entrusting the HERALD and her 16 lives to R. T. Sommers, a man having no experience on the high seas in the stormy season, having no qualifications for an off-shore command and having no knowledge of even the most elementary steps to take in a emergency occurring off-shore. We do not question Mr. Sommers' blind courage, but the HERALD was entitled to more.

The District Court accepted the finding proposed by the SEA FOX interests that the towing hawser parted as a direct result of the violence of the storm and was an event not contributed to by the SEA FOX or libelants. This finding not only is not supported by the evidence but is contrary to the evidence. The

libelants' testimony (Apostles p. 124) is that the towing hawser "Parted right on the fairleads. The wire finally smashed itself right there until it parted". It appears from the record, and in fact is not contested, that the proximate cause of the parting of the towing hawser was the defective condition of the towing engine which prevented the SEA FOX from either letting out or heaving in the hawser resulting in the same portion of the hawser wearing and chafing continuously on the fairleads until inevitably it broke. We recall that prior to putting into Drake's Bay on November 8th the towing engine was apparently stronger than the towing hawser since it was the hawser which broke, even though in that episode the towing engine suffered substantial damage including effective destruction of the fairlead traveller which was never repaired and without which it was impossible to heave in the towing hawser while under way. On the other hand it appears that on November 14th the towing hawser was stronger than the towing engine since on that date the clutch gears of the towing engine stripped. We do not know what portion of the towing engine broke on November 13th during relatively calm weather. In any event it does not appear that the towing engine was properly inspected or repaired in any way before leaving Drake's Bay. Since it appears from the libelant's own log and testimony that on leaving Drake's Bay the SEA FOX had only one-half of an effective towing engine (it could let out but could not heave in because of the absence of the fairlead traveller) the SEA FOX

interests had the burden of proving that such negligence and unseaworthiness did not contribute to the ultimate parting of the towing hawser. The record shows quite the contrary. The record is completely absent any testimony or evidence that a properly qualified skipper of the SEA FOX (if she had had one) would not have insisted that the towing equipment of the SEA FOX be inspected and in seaworthy condition before leaving Drake's Bay.

The failure of Shipowners in this regard is wholly inexcusable since at Drake's Bay the tug SEA PRINCE was in attendance and under the towage agreement (Apostles p. 290) Shipowners had the option of using the tug SEA PRINCE.

The failure of the SEA FOX to seek Coast Guard assistance or a port of refuge before 4:20 P.M. on the 14th when it was too late is incredible in view of the SEA FOX log notation that its towing engine broke before midnight on the 13th and in view of the weather information that was available to it on the 12th and 13th. We quote the following excerpts from Respondent's Exhibit J (not printed) which are the scripts of the weather broadcasts to mariners during the period in question:

‘0830 PST November 12, 1948

Tatoosh to Cape Blanco variable winds 5 to 15 mph becoming westerly 10-20 mph late today or tonight. Mostly cloudy with light rain Washington coast by this afternoon and likelihood of light rain north Oregon coast tonight.

‘0800 PST November 13, 1948, summary north-east Pacific.

A storm of considerable intensity is near 53 N 144W with pressure about 985 mbs moving north-east towards the coast north of Vancouver Island but will affect the coast as far south as Oregon by tonight. Southerly wind force 6 to 9 within 300 miles of the center on the east side becoming westerly as the storm passes. Another disturbance moving eastward centers north of the Aleutian islands but low pressure and fresh south-westerly winds extend south to latitude 45 from the Aleutians and Alaska Peninsula.

‘0830 PST November 13, 1948 Tatoosh to Cape Blanco.

Off Washington coast wind becoming south-southeast 25-35 mph this evening increasing during the night and shifting to northwest Sunday. Off Oregon coast wind northwest 15-25 mph passing to south or southeast and increasing to 25-35 mph tonight.

A storm of considerable intensity lies 500 miles off the coast of British Columbia moving toward the coast north of Vancouver Island. It will affect the coast from Oregon northward tonight but will not extend its effect as far down as California.

‘2000 PST November 13, 1948.

An intense disturbance has moved east north-eastward at 32 knots or approximately 350 miles southwest of Juneau Alaska with lowest pressure near 980 mbs. The center is expected to move

northeastward at about 20 knots with gale force wind within 500 miles of the center. The associated strong front is located at about 200 miles off the Washington coast and extends to the north-northwestward and to the south-southwestward with gale force wind from about 45 north latitude northward. It is expected to move southeastward at approximately 30 knots.

Coastal storm warnings. Southeast storm warnings are displayed until 1500 PST Sunday on the Washington Coast and mouth of the Columbia River for southeasterly wind 35 to 45 mph. Small craft warnings are displayed for the same period south of Astoria to Cape Blanco and over the inland waters of Washington for southeasterly wind of 25 to 35 mph. Winds will shift to westerly early Sunday.

The duty of a tug to take its tow to refuge upon receiving indications of stormy weather is stated as negligence for which the tug is liable in *The Benjamin H. Wharfard*, 290 Fed. 816; *The Victoria*, 79 Fed. 122, and *The Edgar H. Vance*, 284 Fed. 56 (cert. den. 260 U.S. 750).

The negligence of the SEA FOX in failing to seek refuge on the 12th, 13th and 14th is particularly inexcusable in view of its recent experience of the 6th, 7th and 11th. The SEA FOX log (Respondents' Exhibit A) for November 6th indicates that in a wind of force 5 (19 m.p.h.)⁶ the SEA FOX was unable to

⁶Beaufort Scale is set forth in Appendix "B".

control the HERALD and was making "sternway". The SEA FOX witnesses have furnished no satisfactory explanation of their failure. It must be assumed that the failure was due to sheer recklessness and disregard of the weather, to lack of knowledge of position or to lack of necessary charts, all of which are in themselves negligence.

It is clear from an examination of the SEA FOX log for the 6th, 7th and 11th that in the early stages of the voyage the SEA FOX crew had had ample opportunity to learn that the SEA FOX was unable to handle or control its tow in a wind of force 5 on the Beaufort Scale (17 to 21 miles per hour). On the 7th, for example, with a wind of force 5 the SEA FOX went backwards for 31 miles and the tow line parted.

Shipowners also had knowledge of the proviso in the U. S. Salvage Association survey (Libelant's Exhibit 7; Apostles on Appeal, page 285) cautioning the tug to take advantage as much as possible of favorable weather.

In view of this background of experience and of expert caution, it is incredible that upon receiving the weather information on November 13 clearly indicating the imminency of storm weather that the SEA FOX did nothing but keep on its course.

On this phase of the matter we conclude that Shipowners has failed to carry its burden of proof under the rule of *The Pennsylvania* case that the absence of a properly licensed and qualified master not only

did not but could not have contributed to the HERALD's troubles in that there is *no* evidence controverting the proof of Sommers' incompetency and negligence in the following particulars:

(a) Sommers had no experience in towing large vessels at sea at that season of the year.

(b) Sommers was incompetent in that he permitted the tow line to break on November 7 in relatively mild weather.

(c) Sommers was incompetent in that he permitted the new wire given to the HERALD on November 7 to become fouled on the SEA FOX towing engine.

(d) Sommers was incompetent in that he departed from Drake's Bay without checking the towing engine, without repairing the fairlead traveller and without having a satisfactory insurance wire aboard.

(e) Sommers was incompetent in that he failed to head for sea and immediately call for aid when storm warnings were heard. In fact, Sommers waited nearly 24 hours before taking any action. Each and all of such faults contributed to the circumstances wherein salvage services were required.

THIRD SPECIFICATION OF ERROR.

The District Court erred in holding and finding that the SEA FOX interests are entitled to an award in the amount of \$24,750. Assignment of Errors,

numbered 1, 4, 7, 8, 9, 12, 16, 17, 18, 19, 20 and 21 (Apostles on Appeal, pages 76-79).

Under this heading we discuss two fundamental errors of the trial Court and two additional errors which were sequential to the fundamental errors. The fundamental errors were the trial Court's failure to hold the SEA FOX barred from claiming salvage by reason of (1) its fault and negligence and (2) its contractual obligation to the tow. The sequential errors are found in the District Court's failure, after erroneously holding that the SEA FOX was entitled to claim any salvage, to reduce the award otherwise attributable to the SEA FOX services by reason of the tug and tow relation and its failure to attribute a proper proportion of the total salvage services to the Government vessels. The sequential errors we treat under the subheading, "Excessive Award to Sea Fox."

Negligence of SEA FOX.

The specifications of negligence and fault attributable to the SEA FOX interests are fully discussed under our First and Second Specifications of Error, and at this point we respectfully request that the prior discussion again be fully considered.

All authorities are agreed that a tug cannot recover salvage when its own fault has contributed to the peril from which the tow is saved.

The Minnehaha, Lush 335, 15 Eng. Reports, Full Reprint 444;
The Marechal Suchet, XI Asp., N.S. 553;
The Krona, 28 Fed. 318.

The Contract as a Bar to Salvage.

Under the towage agreement (Apostles on Appeal, page 290) Shipowners agreed to "furnish the tug SEA PRINCE or SEA FOX and use its best efforts to tow the SS HERALD OF THE MORNING from San Francisco Bay to Everett, Washington."

The general rule is that there can be no salvage claim where there is a contractual or relational duty to assist. The rule is stated in *Robinson on Admiralty*, page 709: "Salvage can be had only if the property saved is in peril and has been rescued from the peril by those who were under no legal duty to act."

It is undisputed that it is in only the most unusual circumstances that a tug may claim salvage from her own tow. The question is whether the SEA FOX interests have proved that such extraordinary circumstances existed.

The SEA FOX interests can claim salvage only if the contract of towage was frustrated by unforeseeable supervening circumstances relieving them of any obligation to use their "best efforts" to tow the HERALD. Even *force majeure* does not release a promisor from his contractual obligations unless the *force majeure* which renders performance more difficult was unforeseeable. *Intercoast S. S. Co. v. Seaboard Transpt. Co.*, C.C.A. 1, 291 Fed. 13.

No circumstances or conditions were encountered by the SEA FOX which were not foreseeable or not to be anticipated during the course of a voyage in

November off the northern Pacific Coast. The witnesses without exception testified that November was "not a good month" or was a "stormy month".

We also quote, as we did for the District Court, an excerpt from The United States Coast Pilot, Pacific Coast (Sixth Ed.), a United States Government publication, from its section on Pacific Coast weather by months (pp. 36-37) :

"October marks the beginning of stormy weather. Occasional disturbances with high southeasterly gales may be expected from the Strait of Juan de Fuca south to Point Reyes. Rainfall is heavier and fog is less frequent except south of Cape Mendocino.

November is a stormy month. Southeasterly gales are frequent, increasing in severity toward the close of the month. This month marks the beginning of the rainy season in California.

December is a stormy month. Southeasterly gales are frequent and winds from 40 to 60 miles an hour may occur with these storms. The rainfall is heavy along the entire coast. Low-lying fogs frequently occur in the morning along the coast, but are much less frequent than in summer."

We do not doubt that life aboard a tug at the time in question was thoroughly unpleasant. That, however, is a hazard normally incident to the life of a seafaring man aboard seagoing tugs at that season in that area. There is nothing in the record to indicate that the weather was other than that which might normally have been foreseeable at that season and even the salty expressions of the seafaring libel-

ant participants do not lead to a contrary conclusion. We do not contend that the weather conditions encountered by the SEA FOX offshore may not have been somewhat more severe than those reported by the Government coastal stations, but it is nonetheless interesting to refer to Respondent's Exhibit J (not printed). The highest reported wind velocity for the entire coast for the period from November 14th through November 19th was 44 (statute) miles per hour reported by Tatoosh 2000 November 14th. The next highest reported velocity was 35 (statute) miles per hour reported by Point Arguello 2030 November 14th and the only other velocity reported in excess of 30 miles per hour was the wind of 32 miles per hour reported by Tatoosh 0800 on the 16th.

The weather was unpleasant but not unforeseeable.

That the SEA FOX did nothing that it was not required under its contract to do is perhaps best stated by considering briefly the legal situation that would have arisen if the SEA FOX had broken its contract and failed to "use its best efforts", i.e., if it had completely abandoned the HERALD and the HERALD had been lost.

In the *Barryton*, 42 F. (2d) 561, the tug Barryton was held liable for the loss of three barges during a storm and was held at fault because "(3) it left the barges and failed to take adequate steps to assist them after the hawser broke."

In the *Seminole*, C.C.A. 4, 279 Fed. 94, the tug was held guilty of "inexcusable negligence" and lia-

ble for loss of the tow where the tug failed to stand by the tow and do everything possible to save it after being forced to cast the tow adrift in a gale.

In *In re Moran* (D.C.), 120 Fed. 556, 564, the Court said:

“To excuse a tug for leaving and remaining away from her tow, there should be proof that the tow was sinking, or past saving, or that the tug was so injured or in such danger that it could not stay or return, or similar condition.”

In *Appeal of Cahill*, 124 Fed. 63, 64 (C.C.A. 2), the Court said:

“Even if the circumstances had been sufficient to justify the master of the tug in cutting loose from the dredge in order to take off the men, they did not justify him in deserting her and her scows and allowing them to be beached without any effort to save them. We are satisfied there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he has been deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual.”

In *Alaska Commercial Co. v. Williams* (C.C.A. 9), 128 Fed. 362, 368, this Court said, in considering the length of time the tug's duty to stand by the tow endures:

"It certainly existed during that day and so long thereafter as the schooner continued to drift toward the shore or to proceed on her course to Yakutat, and so long as the Bertha could have returned and rescued her."

In *Atkinson v. Scully* (D.C.), 246 Fed. 463, the Court said:

"It must be remembered that the courts have held tugs to a high degree of diligence in endeavoring to save a tow which has gone adrift. Usually the tow is helpless, and to abandon it is to commit it to almost certain loss or injury, where a gale is on and the sea is rough."

If the SEA FOX had done any less than it did and as a result the HERALD had been totally lost, there is no question that Waterman would be entitled to recover from Shipowners. Since the alleged services of the SEA FOX were only in pursuance of its contract and no circumstances or conditions were encountered which were beyond the reasonable contemplation of Shipowners in entering into the towage contract, Shipowners is barred from claiming salvage.

For the same reason the master, officers and crew of the SEA FOX are likewise barred from claiming salvage.

In the *Marechal Suchet* (XI Aspinall's Reports of Maritime Cases, N.S. (1911), p. 553), the tow had been driven aground during a gale in the English Channel in February and the tug had assisted in the refloating of the vessel and claimed salvage. After

commenting that the weather conditions were no more severe than might reasonably have been expected, the Court said:

“In my view what she did she ought to have done as the tug under the towage contract.

* * * In my opinion the master and crew of the *Guiana* are not entitled, as they performed no more than their duties in the towage service
* * *,”

We have searched diligently both the American and English cases and have been unable to find any case where the tug has been relieved of its contract and entitled to claim salvage of its tow by reason of encountering severe weather conditions. All of the cases in which the tug has been granted salvage are cases in which the tow was placed in danger by a failure of the *tow's* own equipment or in which the tug's watertight integrity had been breached through no fault of her own. The cases in which the tug has been granted salvage against its tow are:

The Minnehaha, Lush 335, 15 Eng. Rep., Full Reprint 444 (failure of hawser furnished by tow);

The I. C. Potter, L.R., 3 A. & E. 272 (tug's bunkers flooded in full hurricane and suffered damage requiring £144 and two weeks to repair);

The Joseph F. Clinton, 250 Fed. 977 (break-down of tow's pump);

The City of Haverhill, 66 Fed. 159 (tow sprang seams and leaking badly);

The City of Portland, 298 Fed. 27 (tow lost propeller shaft and took water);
The Connemara, 108 U.S. 352, 27 L. Ed. 751 (fire on tow);
Kovell v. Portland Tug and Barge Co. (C.A. 9), 171 Fed. (2d) 749 (damage to tug and tow sufficient to terminate voyage; claim not asserted by tug and did not involve services by or aboard tug).

The rule is properly stated in the *I. C. Potter*, L.R., 3 A. & E. 272:

“I think the true criterion by which it is to be ascertained whether the towing vessel has become a salvor is whether the supervening circumstances were such as to justify her in abandoning her contract.

“* * * On the other hand, the law is clear that a contract once entered into cannot be broken merely because a change of weather or other supervening circumstances have rendered the execution of it more onerous than was anticipated. In my judgment there must be among the supervening circumstances an element of serious danger, not in contemplation of the parties to the contract, in order to justify the abandonment of the contract and to found a salvage service.”

In the *City of Khios* (D.C. S.D. N.Y.), 16 Fed. Supp. 923, it was held that a whole gale with squalls of hurricane force did not constitute a “peril of the sea” since “it was reasonably to be expected that in the North Atlantic, at that particular time of the year, severe weather would be encountered”.

In the *Naples Maru*, 1939 A.M.C. 1090, Judge Learned Hand in holding a vessel not responsible for cargo damage under its bills of lading in considering a storm in the North Pacific in November and December with wind velocities of 9 and 10 on the Beaufort scale said, "It was no more than was to be expected in those waters at that time".

In the *Schickshinny*, 1942 A.M.C. 910, where the vessel encountered winds of Beaufort force 11 and 12 on the North Atlantic in March, the Court said: "Unquestionably, rough weather and heavy seas were encountered, but where a vessel is subjected to no greater risk or damage than reasonably might have been anticipated on the voyage, peril of the sea furnishes no immunity".

It is clear that the SEA FOX encountered no conditions that were not foreseeable for the North Pacific in November and within the reasonable contemplation of Shipowners at the time of entering into the towage contract. The SEA FOX was, therefore, at no time free of her contractual obligation to use her "best efforts".

The Poznan, 276 Fed. 418;

Rotterdamsche Lloyd v. Gosh, 298 Fed. 443;

Balfour Guthrie v. Portland etc. S. S. Co., 167

F. 1010.

All services rendered by the SEA FOX were in pursuance of her contract and the libelants are barred from recovering salvage.

EXCESSIVE AWARD TO SEA FOX.

We do not contest the aggregate valuation which the District Court placed on all services rendered to the HERALD of \$60,000 (Apostles p. 46), although we do consider it on the high side. In first determining the aggregate value of all services and then allocating among the participants, whether or not the participants are in a position to claim salvage, the District Court followed established law. *Robinson on Admiralty*, p. 748; *The Anahuac*, 295 Fed. 346, aff'd 3 F. (2d) 250. We do not contest the trial Court's apportionment of the *services* performed as between the SEA FOX interests and the Puget Sound interests. We contended at all times that SEA FOX services substantially exceeded the services of NEPTUNE and HERCULES, and we contended throughout that the HERCULES, NEPTUNE and SEA FOX interests combined furnished less than 50% of the aggregate services including those furnished by the Government vessels.

We strenuously contest the apportionment of only \$15,000 of the overall award to the Government vessels and we strenuously contest the apportionment of the full \$24,750 to the SEA FOX interests as if the SEA FOX were a meritorious volunteer salvor.

(a) **SEA FOX Contract as Partial Bar.**

The District Court having erroneously failed to bar the SEA FOX from salvage by reason of its negligence and contractual obligation, it was further error for the District Court in its decree to award the

SEA FOX the full portion of the aggregate award attributable to its services without *any* reduction on account of the tug's obligation to her tow. Under no conceivable theory was the SEA FOX entitled to claim as a volunteer salvor and its was obvious error for the District Court to treat her as such.

City of Portland (C.C.A. 5, 1924), 298 Fed. 27.

"* * * We are of the opinion, therefore, that the Ella Andrews and the Wilmot were rendering salvage service from the time the propeller shaft dropped out of the City of Portland, but that they should not receive as great an award as would be allowed to an independent tug."

(b) Government Vessels.

In this phase of our discussion we disregard those factors of fault and contract which we respectfully submit bar the SEA FOX from salvage. For purposes of this discussion we accept the trial Court's valuation of the overall services at \$60,000 and our sole endeavor is to review the services performed by all vessels so that this Court may determine whether we are correct in our contention that the services rendered by the government vessels were at least 50% (or \$30,000) of the overall rather than 25% (or \$15,000) of the overall as found and held by the trial Court. It is our respectful contention that a review of the record will satisfy this Court that the trial Court should have allocated more than \$30,000 of the aggregate award to the government services and less than \$30,000 to the combined SEA FOX, HERCULES

and NEPTUNE services. We have not appealed from the Puget Sound decree and we of course do not contend on the phase of the case that we are discussing here that the full \$15,000 deficiency in the government allocation should be deducted from the SEA FOX award but we do claim that in any event its award should be reduced proportionately.

The Blackwell, 10 Wall. 1, 19 L. Ed. 870 is usually cited for the factors to be considered in valuing salvage services:

“* * * Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service.

1. The labor expended by the salvors in rendering the salvage service.
2. The promptitude, skill, and energy displayed in rendering the service and saving the property.
3. The value of the property employed by the salvors rendering the service, and the danger to which such property was exposed.
4. The risk incurred by the salvors in securing the property from the impending peril.
5. The value of the property saved.
6. The degree of danger from which the property was rescued.

The purpose of this discussion is entirely comparative and as items 5 and 6 are identical for all salvors, these items require no discussion.

Salvors' values:

Sea Fox	\$ 125,000	Winona	\$ 750,000
Hercules	125,000	Balsam	400,000
Neptune	150,000	*Prairie	950,000
\$ 400,000		\$2,100,000	

*The USS PRAIRIE was a specialized ship of a size at least as large as the HERALD. Being a government vessel, it has no "market value". Its replacement value was undoubtedly in excess of the value of the HERALD when converted to a cargo vessel, to-wit, \$957,818.

It is to be borne in mind that salvage services are claimed only for the time *subsequent* to the breaking of the tow line at 0040 November 16 and that during the entire salvage period the SEA FOX engine was broken and she had aboard only a short length of cable which was never broken out for use and which for practical purposes was probably unusable (Apostles p. 392). On the other hand the cutter WINONA carried a complement of 106 officers and crew, was 254 feet in length, had 4000 horsepower, a speed of 18 knots and was equipped with emergency towing gear. The BALSAM carried a complement of 44 officers and crew, was 180 feet in length, had 1000 horsepower, a speed of 13 knots and was equipped with emergency towing gear. The Coast Guard vessels were well equipped, well manned and well handled. We respectfully call to this Court's attention the clear, concise and informative testimony of the commanders of the Coast Guard vessels which appears at pages 386-428 of the Apostles on Appeal. Despite the cogency of that testimony which is not seriously

disputed by the libelants, the trial Court awarded \$24,750 to the SEA FOX and only \$15,000 to the government vessels. The excessiveness of the SEA FOX award is perhaps best disclosed by a chronological listing of the efforts of each vessel. In reviewing the services performed by each vessel we wish to make it clear that while we believe the ratio of the award as between the SEA FOX and Puget Sound interests was indicative of the relative quantum of service rendered by each, we are satisfied that the awards to both the Shipowners and Puget Sound are excessive. So far as this present discussion is concerned the SEA FOX and Puget Sound interests are on the same footing but only the SEA FOX interests are before this Court. In the following summary the services rendered by all vessels, the WINONA, BALSAM, SEA FOX and HERCULES are fairly stated. There is only brief mention of the NEPTUNE because she sank before she could render any services of benefit to the HERALD.

SEA FOX

Government Vessels

November 14

1900 advised HERALD she had radioed for aid. 2140 hours BALSAM arrived at scene from Astoria, Oregon.

November 15

Tow line still secured to HERALD. BALSAM stood by tug and tow all that day.

November 16

0040—Tow line broke. SEA FOX stood by until 0920 when, on orders from BALSAM she proceeded to and remained in vicinity of the NEP-

BALSAM stood by until 0920 when she supplied collision mats to plug hole in side of NEPTUNE and picked up the crew of the sinking NEP-

SEA FOX

TUNE until NEPTUNE sank at about 1632 hours and then returned to vicinity of HERALD at 1710 hours.

1930—Told HERALD to drop anchor and to let out nine shots of chain. This order was obeyed by HERALD.

Government Vessels

TUNE. Thereafter stood by the HERALD and put a 10" manila tow line to HERALD at 1515 hours.—Commenced to tow the HERALD but the line soon parted. Stayed in vicinity of HERALD.

1930 hours—directed SEA FOX by radio to tell HERALD to drop HERALD's anchor at time when HERALD was at the 35-fathom line. Depth of water was disclosed by "fathometer" aboard BALSAM. The U.S.S. PRAIRIE, a Navy destroyer tender, came to the vicinity this day but did not remain on being told by the Coast Guard vessels her services were not required.

November 17

SEA FOX received bitter end of 12" line and thereafter kept a strain on it to ease strain on HERALD's anchor.

0440—Coast Guard WINONA arrived at scene. In morning put a 12" manila towing line to HERALD and transferred the bitter end to the SEA FOX. BALSAM and WINONA remained at scene.

1350—WINONA left for Astoria to put NEPTUNE's crew ashore.

2312—WINONA returned to the vicinity of HERALD. On instructions from BALSAM the HERALD dropped her starboard anchor chain overboard. WINONA and BALSAM remained in vicinity balance of day.

SEA FOX

Government Vessels

November 18

SEA FOX holding strain on the 12" manila line. After the HERCULES put its towing line to the HERALD at 0830 hours, SEA FOX and HERCULES were in "irons".

WINONA and BALSAM standing by. HERCULES arrived about 0300 hours and shortly thereafter the WINONA departed when Captain Eastman of the BALSAM considered the situation was in hand.

HERALD was unable to lift its port anchor and tugs were in "irons", so BALSAM sent acetylene cutting torch to HERALD. Anchor line cut permitting HERCULES and SEA FOX to get out of "irons".

1115 hours—tow toward Everett, Wn. resumed with SEA FOX and HERCULES towing.

1115—tow resumed and BALSAM remained with tug and tow.

November 19

HERALD in tow of SEA FOX and HERCULES. Arrived safely at Everett, Wn. at about 2130 hours.

BALSAM remained with HERALD until 1005 hours when the convoy was in smooth water in the Straits of Juan de Fuea. Thereafter BALSAM proceeded to sea.

(If the Court should desire a more detailed summary of the events of the entire voyage, reference is respectfully made to Appendix "A" hereto.)

Without the assistance of BALSAM and WINONA, of what value was the SEA FOX to HERALD after the tow line parted on the 16th? It is true that SEA FOX (1) stood by HERALD and on instruction of BALSAM stood by NEPTUNE while latter was sink-

ing; (2) relayed instructions from BALSAM to leave HERALD drop her anchor on late evening of 16th; (3) took bitter end of WINONA's 12" towing line on morning of 17th and thereafter eased strain on HERALD's anchor, and (4) assisted HERCULES in towing HERALD into Puget Sound. Nevertheless, SEA FOX was helpless alone. She had no usable towing line aboard. She had no cutting equipment aboard. Her towing engine was broken down. It is fair to state that but for the services and equipment supplied by WINONA and BALSAM the services of SEA FOX would have been worthless.

An overall award of \$60,000 for *all* interests while high, is not too far out of line. An allowance of only \$15,000 to the government vessels as compared with \$24,750 to SEA FOX is clearly erroneous. Under the *undisputed* facts in this case, this Honorable Court must of necessity arrive at a definite and firm conviction that a mistake has been committed in this regard.

It is obvious that the trial Court erred in granting too great a share of the overall award to SEA FOX. It is equally obvious that the trial Court erred in failing to make *any* deduction from the award to SEA FOX by reason of the tug/tow relationship.

FOURTH SPECIFICATION OF ERROR.

The District Court erred in dismissing the cross-libel. Assignment of Errors, numbered 2, 3, 13, 14 and 15 (Apostles on Appeal, pages 76-78).

The merits of the question raised by this specification of error are discussed at large under Waterman's First and Second Specifications of Error and we respectfully request that the Court consider at large under this heading the discussion previously offered under the First and Second Specifications.

The HERALD was placed in her position of peril by reason of the negligence of Shipowners. This negligence has heretofore been fully discussed. It is now necessary only to discuss the questions raised by the District Court's conclusion (Apostles on Appeal, page 69) that Waterman, this appellant, is estopped from claiming or contending that the hull insurance on the HERALD did not inure to the benefit of the SEA FOX or that said hull insurance did not release the tug SEA FOX from liability.

We refer first to clause 8 of the towage contract (Apostles on Appeal, page 293). Under that clause Everett-Pacific Shipbuilding and Drydock Co. was obligated to secure insurance on the HERALD for the benefit of the SEA FOX or failing that to itself become the insurer of the HERALD, both for itself and for the SEA FOX interest. We do not discuss the validity of this contractual provision. It is necessary only to point out that Shipowners were not added as assured to Waterman's hull policies and that whatever Everett-Pacific did or did not do in pursuance of this clause not only does not appear in the record but can be of no concern insofar as this appellant, Waterman, is concerned. Shipowners is liable to Waterman for the negligence of the SEA FOX, and the

fact that Everett-Pacific may be liable to Shipowners for having failed to insure Shipowners cannot bar Waterman from obtaining the recovery from Shipowners to which it is entitled. We frankly admit that we are wholly unable intelligently to discuss the matter of "estoppel" as used in this context since Waterman was required to do nothing under the towage contract and did nothing under the towage contract.

The remainder of this conclusion of the District Court relates to Shipowners' contention that since for its own benefit Waterman paid a premium of $1\frac{1}{8}\%$ (with release of tug) instead of 1% (no release of tug) Waterman is estopped from asserting the invalidity of clause 4 of the towage contract (First Specification of Error herein) even though Waterman was not a party to the towage contract. The invalidity of such clauses is clearly established but it is the added legal expense such as has been caused in this case by the "release of tug" clause that justifies the exaction of an additional premium when such towage contracts are employed. The terms and conditions of Waterman's insurance have no proper place in this case and have no bearing on any issues before either this Court or the District Court. There is no contention that Waterman was obligated to do anything under the towage contract or that it did anything it shouldn't have done or failed to do anything that it should have done and in such circumstances there can be no estoppel.

In this case Waterman tendered to Shipowners the defense of the claims for salvage being asserted

against the HERALD. The tender was not accepted by Shipowners, and thereafter Waterman filed a cross-libel against Shipowners in which Waterman sought to recover its damages and counsel fees in defending the claims for salvage. The claims for salvage arose solely by reason of the breach of the towage contract by Shipowners and the negligence of Shipowners and therefore the ultimate responsibility for payment of such salvage services rests on Shipowners. The cross-libel therefore should not have been dismissed.

The law is clear that a shipowner who solely because of his ownership of a vessel is held liable for a claim where the fault is that of a third person may recover over against that third person not only the amount so paid but also his attorney's fees and expenses of defending the original claim.

Standard Oil Co. v. Robins Drydock, Etc. Co.
(C.C.A. 2, 1929), 32 F. (2d) 182;

Rederi v. Jarka Corporation, 82 Fed. Supp. 285;

The C. F. Ackerman, 5 Fed. Cas. No. 2562.

On reversal of the judgment of the trial Court dismissing the cross libel, we request that this matter be remanded to the trial Court for proof of Waterman's damages, expenses and attorney's fees in awarding judgment on the cross libel against Shipowners.

CONCLUSION.

We respectfully urge:

1. SEA FOX interests should recover nothing for alleged salvage services.
2. It was reversible error to dismiss the cross libel against Shipowners.
3. The case should be remanded to the trial Court to determine the amount of damages recoverable by Waterman and with instructions to award judgment in favor of Waterman on its cross libel because of statutory fault and other acts of negligence by SEA FOX.

Dated San Francisco, California,
January 28, 1952.

Respectfully submitted,
GRAHAM & MORSE,
CLARENCE G. MORSE,
FRANCIS L. TETREAULT,
Proctors for Appellant.

(Appendices "A", "B" and "C" Follow.)

Appendices.

Appendix "A"

November 3, 1948

The SEA FOX and HERALD were surveyed by the Board of Marine Underwriters and were fit to proceed on the tow but with the express proviso that the SEA FOX should take "advantage as much as possible of favorable weather" (Libelants' Exhibit 7). The tug and tow were originally scheduled to leave San Francisco Bay on

November 4, 1948,

but because of threatening weather conditions, Shipowners concluded to delay the departure (Apostles on Appeal page 34). At time of departure the SEA FOX had its towing wire, which was about 1200 feet total length, secured to the HERALD and had aboard a spare or "insurance" wire of the same length. In addition, the SEA FOX had a used 600 ft. wire aboard which, even on libelants' testimony, was useable only in an emergency. The SEA FOX did leave on

November 5, 1948.

Satisfactory progress was made until

November 7, 1948,

when the towing line carried away at 1450 hours in relatively moderate weather. The SEA FOX log then indicating a fresh to strong breeze or wind force of force 5 or 6 on the Beaufort scale or 9 to 27 miles per hour. Eventually the SEA

FOX put its spare or "insurance" tow wire to the HERALD but this tow wire became kinked on the winch drum on the SEA FOX. The entire wire was cut off the drum and thrown overboard, and the HERALD drifted until

November 8, 1948,

at 1515 hours, when the Tug SEA PRINCE came from San Francisco and towed the HERALD into Drake's Bay. At Drake's Bay on instructions of SEA FOX, the part of the anchor chain which was hanging in the water (some 45 fathoms) and the SEA FOX's original towing wire were dropped to the bottom of the ocean and abandoned. At Drake's Bay the SEA PRINCE's towing wire was shackled to the HERALD's anchor chain and some 45 fathoms of chain was run out from the HERALD. The broken fair-lead traveller on the SEA FOX was not repaired. Thereafter the SEA PRINCE's towing wire was transferred to the SEA FOX, and on

November 9, 1948,

at 0100 hours, SEA FOX and HERALD resumed the voyage. After leaving Drake's Bay the SEA FOX had no insurance wire but only the short length in addition to the wire in use. It was a wire to be used only in an emergency (Apostles on Appeal page 160). In respect to this short wire, Captain Eastman of the WINONA testified that on the 17th (Apostles on Appeal page 392):

"The SEA FOX stated that they could take the HERALD OF THE MORNING in tow but that they had no towing hawser, as they had broken their hawser."

The weather remained moderate until

November 12, 1948,

and the voyage continued. On this date the weather was generally a "gentle breeze", force 3. On

November 13, 1948,

the SEA FOX overheard weather bureau forecasts of impending storm off the Columbia River and Washington coast. The broadcast recited (Respondent's Exhibit H; Apostles on Appeal page 340) :

"Southeast storm warnings ordered displayed Washington Coast and Mouth of Columbia, small craft warnings south of Astoria to Cape Blanco and over inland waters of Washington 3:00 PM for southeasterly winds 35-45 mph Washington Coast, and 25-35 mph Oregon Coast tonight, shifting to westerly early Sunday and decreasing, and southerly winds 20-30 mph over inland waters."

The SEA FOX knew of the approach of the storm which they thereafter experienced during the following days (Apostles on Appeal page 194). On this date the weather was a gentle breeze most of the day but blew up to a strong breeze prior to midnight. On

November 14, 1948,

the weather was a "fresh gale", force 8 (37 miles per hour) at 0800 and a "fresh breeze" or a "strong breeze", force 5 and force 6 for most of the balance of the day (17 to 27 miles per hour). At 1900 hours the SEA FOX advised HERALD she had called for aid from the Coast Guard and that her towing engine had broken down. At 2030 hours the Coast Guard cutter BALSAM arrived in the vicinity of the HERALD. At this time HERALD was 17 miles distant and nearly southwest of the Columbia River lightship (Apostles on Appeal page 409). On

November 15, 1948,

the BALSAM stood by all day and at 2200 hours the tug NEPTUNE arrived in the vicinity and hailed the HERALD and thereafter stood by. During the day of the 15th the wind was "gentle breeze" to "moderate breeze" (force 3 and force 4 most of the time), but built up to a "strong gale", force 9 (44 miles per hour) near midnight. Then on

November 16, 1948,

at 0040, the tow line to the SEA FOX parted. Shortly thereafter the NEPTUNE attempted to shoot a line to the HERALD from the lee side but soon gave up on account of darkness and existing weather. Before daylight on the morning of the 16th the wind was severe, a "whole gale" (force 10, or 52 miles per hour), thereafter quiet-

ing down to a "moderate breeze" (force 4 or 14 miles per hour). During the first eight hours of November 16th the wind was approximately twice as strong as it had been (Apostles on Appeal page 413). At 0920 when the wind was a "moderate gale", force 7 or 30 miles per hour, the NEPTUNE maneuvered on the weather bow of the HERALD and got a messenger line aboard, but while getting the wire line aboard the HERALD maneuvered too close on the weather bow of the HERALD which was lying in the trough of the sea, and was thrown by a wave against the HERALD's bow, holing NEPTUNE's hull, resulting in her sinking several hours later. At 1515 hours this same date the BALSAM put a 10" Manila line aboard the HERALD, but it soon parted at the splice. On instructions from the BALSAM the SEA FOX remained with the NEPTUNE. The SEA FOX did not return to the HERALD until about 1710 hours (Apostles on Appeal page 418). The HERALD continued to drift until 1930 hours when the HERALD, on orders from the BALSAM, relayed to the HERALD by the SEA FOX (Apostles on Appeal page 248), dropped her port anchor and thereafter rode at anchor some 10 to 12 miles from shore (Apostles on Appeal page 264). This distance of 12 miles offshore is confirmed by Captain Eastman of the WINONA, whose log for November 18 recites the HERALD was at anchor

at the 35-fathom line and whose log also gives bearings to two shore points which fixes the position of the HERALD. On

November 17, 1948,

at 0440 the WINONA arrived at the scene (Apostles on Appeal page 418). The HERALD "was in no immediate danger" (Apostles on Appeal page 392); during that morning the WINONA placed a 12-inch Manila line aboard and thereafter transferred the line to the SEA FOX. Captain Eastman considered this 12-inch hawser to be adequate to tow the HERALD, stating (Apostles on Appeal page 401):

"* * * in my estimation, a Manila hawser that is long gives you a catenary which acts as a cushioning effect when towing in a sea-way."

On this date, with minor exceptions, the wind was a "gentle breeze" or force 3 (18 miles per hour). On this day the HERALD let go the balance of its starboard anchor chain which, although buoyed, was never recovered. At 1350 hours the BALSAM left the area to take the NEPTUNE's crew to shore, and the SEA FOX and WINONA stayed with the HERALD. The BALSAM returned at 2312 hours (Apostles on Appeal page 423). On

November 18, 1948,

the HERCULES arrived at the scene at about 3:00 a.m. (Apostles on Appeal page 255) and shortly thereafter the WINONA departed, when

Captain Eastman of the WINONA "considered that the BALSAM and the SEA FOX could adequately handle the situation" (Apostles on Appeal page 397). At 0800 hours the HERCULES put a towing wire aboard the HERALD. During the morning, the wind was a "gentle" or "moderate" breeze; at time of departure for Everett it was a "fresh breeze", force 5, and so remained (except at 4:00 p.m. and at 7:00 p.m., when it was force 6, a "strong breeze") until 9:00 p.m., when for two hours it was a "strong gale", force 9, thereafter quickly moderating. The HERALD was unable to release the port anchor chain because the strain prevented the release of the pelican hook, and as a result the tugs were more or less in irons. Accordingly, the port anchor chain of the HERALD was therefore cut, with the aid of the portable cutting equipment supplied by BALSAM and at 1115 hours resumed voyage in tow of HERCULES and SEA FOX toward Everett, Washington, where she arrived without further incident on

November 19, 1948.

On this date the weather was calm (force 0) to a "gentle breeze" (force 3). The tugs and tow were all fast at Everett, Washington, about 9:30 p.m.



Appendix "B"

Beaufort Scale

Admiral Beaufort's Numbers	Average of Velocity	Limits of Velocity		Seaman's Description of Wind
		in nautical miles per hour (knots)		
0	0	Less than 1		Calm
1	2	1 to 3		Light air
2	5	4 to 6		Light breeze
3	9	7 to 10		Gentle breeze
4	14	11 to 16		Moderate breeze
5	19	17 to 21		Fresh breeze
6	24	22 to 27		Strong breeze
7	30	28 to 33		Moderate gale (half a gale)
8	37	34 to 40		Fresh gale
9	44	41 to 47		Strong gale
10	52	48 to 55		Heavy gale (whole gale)
11	60	56 to 65		Storm
12	Above 65		Hurricane

Appendix "C"

SEA TOWS BY TUG "SEA FOX" DURING 1948— R. T. SOMMERS

6/30/48	OIL BARGE	230x46x16	3500 T. Cargo	San Francisco to Coos Bay, Ore. and return S. F.
7/ 8/48	"	"	"	San Francisco to Eureka, Cal. and return S. F.
7/14/48	"	"	"	San Francisco to Coos Bay, Ore. and return S. F.
7/22/48	"	"	"	San Francisco to Eureka, Cal. and return S. F.
7/26/48	"	"	"	San Francisco to Coos Bay, Ore. and return S. F.
8/13/48	SS YOUNG AMERICA	435x63x31		San Francisco to Everett, Wash.
8/28/48	SS COMET	435x63x31		San Francisco to Astoria, Wn. (sic)
10/20/48	OIL BARGE	230x46x16	3500 T. Cargo	San Francisco to Eureka, Cal. and return S. F.
11/ 5/48	SS HERALD OF THE MORNING	435x63x31		Oakland to Everett, Wash.

(Supplied by R. T. Sommers pursuant to request
and agreement during trial.)

